

2
NO. 89-1480

FILED
APR 20 1990

JOSEPH F. SPANGL, JR.
CLERK

**In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989**

MARGARET ANN DURAN,
Petitioner,

v.

STATE OF TEXAS and GEORGE S. BAYOUD, JR.,
Secretary of State of the State of Texas,
Respondents.

**RESPONDENTS' OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS**

JIM MATTOX
Texas Attorney General

MARY F. KELLER
First Assistant
Attorney General

DAVID A. TALBOT, JR.
Special Assistant
Attorney General
Chief, Finance Division

EDNA RAMON BUTTS
Assistant Attorney General
Chief, Insurance, Banking
and Securities Section

***JAMES C. TODD**
Assistant Attorney General
Chief, General Litigation
Division
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2120

ON THE BRIEF:

SEDORA JEFFERSON
Assistant Attorney General

JENNIFER RIGGS
Assistant Attorney General

***Counsel of Record**

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Texas Supreme Court's refusal to consider Duran's mandamus petition to compel the Texas Secretary of State to issue Duran a corporate charter presents a federal question to invoke this Court's jurisdiction under 28 U.S.C. §1257(a).
2. Assuming jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), whether this Court should refrain from exercising its discretionary review in light of the undeveloped posture of this case.
3. Whether the Texas Supreme Court's refusal to consider issuing a writ of mandamus to compel the Texas Secretary of State to issue a corporate charter under the name "Duran's Accounting and Tax Service" violates Duran's first amendment rights to commercial speech when Duran does not hold a license to practice public accountancy, a prerequisite to offering or providing accounting services to the public in Texas.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THIS COURT'S JURISDICTION UNDER 28 U.S.C. §1257(a) HAS NOT BEEN IN- VOKED BECAUSE THE TEXAS SU- PREME COURT'S ORDER DENYING DURAN'S MOTION FOR LEAVE TO FILE MANDAMUS DOES NOT PRESENT A FEDERAL QUESTION	5
A. Final Judgments Predicated on State Law Procedural Defects do not Present Federal Questions for this Court's this Court's Review	6
B. Duran Failed to Meet the Requirements for Mandamus Review Under Texas Law	7
1. Duran had an adequate remedy at law	8
2. There was no clear duty upon the Texas Secretary of State to accept Duran's articles of incorporation	9

II. ASSUMING THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(a), IT SHOULD REFRAIN FROM EXERCISING SUCH JURISDICTION PURSUANT TO ITS DISCRETIONARY AUTHORITY	11
III. THE TEXAS SUPREME COURT'S REFUSAL TO CONSIDER ISSUING A WRIT OF MANDAMUS TO COMPEL THE SECRETARY OF STATE TO ISSUE A CORPORATE CHARTER UNDER THE NAME "DURAN'S ACCOUNTING AND TAX SERVICE" DID NOT VIOLATE DURAN'S FIRST AMENDMENT RIGHTS TO COMMERCIAL SPEECH BECAUSE DURAN DOES NOT HOLD A LICENSE TO PRACTICE PUBLIC ACCOUNTANCY, A PREREQUISITE TO OFFERING OR PROVIDING ACCOUNTING SERVICES TO THE PUBLIC IN TEXAS	13
A. The First Amendment Does Not Protect Unlawful or Misleading Commercial Speech	13
B. The State Has a Substantial Interest in Regulating the Practice of Public Accountancy	17
C. The State's Prohibition on Use of the Term "Accounting" by Unlicensed Individuals Directly and Narrowly Advances the State's Regulatory Interest.	18
CONCLUSION	19
PROOF OF SERVICE	21
APPENDIX.....	A-1

TABLE OF AUTHORITIES

FEDERAL CASES:	Page
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977)	14,16
<i>Central Hudson Gas & Electric Corp. v. Public Service Commission of New York</i> , 447 U.S. 557 (1980)	13,17,18
<i>City Council v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984)	18
<i>Friedman v. Rogers</i> , 440 U.S. 1 (1979)	14,16,17
<i>Hammerstein v. Superior Court of California</i> , 340 U.S. 622 (cause abated), 341 U.S. 491 (1951) (decision rendered)	7,11
<i>Moore v. Sims</i> , 442 U.S. 415 (1979)	12
<i>Newman v. Gates</i> , 204 U.S. 89 (1907)	6,7
<i>Pennzoil v. Texas</i> , 481 U.S. 1 (1987)	11,12
<i>Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations</i> , 413 U.S. 376 (1973)	14
<i>Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico</i> , 478 U.S. 328 (1986)	16,18
<i>Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976)	14,16
STATE CASES:	
<i>Abor v. Black</i> , 695 S.W.2d 564 (Tex. 1985)	10

<i>City of Amarillo v. Hancock</i> , 239 S.W.2d 788 (Tex. 1951)	12
<i>Clark v. Eads</i> , 165 S.W.2d 1019 (Tex. Civ. App.—Fort Worth 1942, writ ref'd)	19
<i>Fulcher v. Texas State Board of Public Accountancy</i> , 571 S.W.2d 366 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e)	16
<i>Garcia v. Peeples</i> , 734 S.W.2d 343 (Tex. 1987)	7
<i>Gordon v. Lake</i> , 356 S.W.2d 138 (Tex. 1962)	9
<i>Johnson v. Fourth Court of Appeals</i> , 700 S.W.2d 916 (Tex. 1985)	7,8
<i>State v. Mauritz-Wells Co.</i> , 175 S.W.2d 238 (Tex. 1943)	9
<i>State v. Walker</i> , 679 S.W.2d 484 (Tex. 1984)	7
<i>Strake v. Court of Appeals for the First Supreme Judicial District of Texas</i> , 704 S.W.2d 746 (Tex. 1986)	10
<i>Texas State Board of Public Accountancy v. Fulcher</i> , 515 S.W.2d 950 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).....	<i>passim</i>

FEDERAL CONSTITUTION AND STATUTE:

U.S. Const., amend. I	<i>passim</i>
28 U.S.C.A. §1257(a)(West Supp. 1989)	<i>passim</i>

STATE STATUTES:

Tex. Bus. Corp. Act Ann. art. 1.01 <i>et seq.</i> (Vernon 1980)	8
art. 3.03	10
art. 9.04	2,8,9
Tex. Gov't Code, Ann. §22.002(c) (Vernon 1988)	3,8,9
Texas Public Accountancy Act of 1979, Tex. Rev. Civ. Stat. Ann. art. 41a-1, §8 (Vernon Supp. 1990)	<i>passim</i>
Texas Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code §37.001, <i>et seq.</i> (Vernon 1986)	10
§37.006	10

OTHER:

Tex. Bus. Corp. Act. Ann., 1955 Bar Comm. Comments to art. 9.04 (Vernon 1980)	9
--	---

NO. 89-1480

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARGARET ANN DURAN,
Petitioner,

v.

STATE OF TEXAS and GEORGE S. BAYOUD, JR.,
Secretary of State of the State of Texas,
Respondents.

**RESPONDENTS' OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS**

TO THE HONORABLE SUPREME COURT:

Respondents, the State of Texas and George S. Bayoud, Jr., Texas Secretary of State, file this their opposition to Margaret Ann Duran's ("Duran") petition for writ of certiorari, respectfully showing the Court as follows:

JURISDICTION

Respondents object to Duran's statement of jurisdiction. This Court does not have jurisdiction pursuant to 28 U.S.C. §1257(a) because the state court decision of which Duran seeks review does not involve a federal question.

STATUTORY PROVISIONS INVOLVED

I. *FEDERAL*

28 U.S.C.A. §1257(a) (West Supp. 1989).

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

II. *STATE*

Tex. Bus. Corp. Act. Ann. art. 9.04 (Vernon 1980).

A. If the Secretary of State shall fail to approve any articles of incorporation, application for certificate of authority to transact business in this State, amendment, merger, consolidation, or dissolution, or any other document required by this Act to be approved by the Secretary of State before the same shall be filed in his office, he shall, within ten days after the delivery thereof to him, give written notice of his disapproval to the person or corporation, domestic or foreign, delivering the same, specifying in such notice the reasons therefor. From such disapproval such person or corporation may appeal to any dis-

strict court of Travis County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

B. Appeals from all final orders and judgments entered by the district court under this Article in review of any ruling or decision of the Secretary of State may be taken as in other civil actions.

Tex. Gov't. Code Ann. §22.002(c) (Vernon 1988).

Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

Tex. Rev. Civ. Stat. Ann. art. 41a-1, §8 (Vernon Supp. 1990). [See Appendix for full text of section 8 of statute].

STATEMENT OF THE CASE

Respondents agree with Duran's rendition of the procedural history of the case, with two exceptions. First, Duran inaccurately states that the Texas Supreme Court denied her petition for writ of mandamus by order dated November 8, 1989. The Texas Supreme Court's order de-

nied Duran's motion for leave *to file* the mandamus petition; it was not a ruling on the merits of said petition. Second, Duran also suggests that she was not notified of the Texas Supreme Court's decision until over a month later. In fact, the Texas Supreme Court sent Duran a letter advising her of the court's decision on the same day it ruled. (Respondents' Appendix, p. A-2).

With respect to the remainder of Duran's statement of the case, respondents note that the factual allegations generally conform to her pleadings below. Respondents would point out to the Court, however, that they were never afforded an opportunity to challenge the factual assertions, as this case was never before a trial tribunal.

SUMMARY OF ARGUMENT

The United State Supreme Court's jurisdiction has not been invoked under 28 U.S.C. §1257(a) because the final judgment from the Texas Supreme Court is based on purely state law grounds; it in no way draws a federal law in question. The Texas Supreme Court's judgment merely determined that it would not grant Duran permission to file an original mandamus proceeding in its court. This was totally proper because, under Texas law, Duran was not entitled to mandamus relief. This Court, therefore, lacks jurisdiction over Duran's petition for certiorari.

Assuming, *arguendo*, that this Court's jurisdiction has been invoked, then this Court should refrain from exercising such jurisdiction. The case in its present posture is totally undeveloped. The Texas courts have not had an opportunity to consider Duran's federal constitutional claims, nor have the respondents been afforded an opportunity to defend against such claims. Any consideration of the federal issue by the Court at this juncture would be repugnant to this Court's long-standing expressions of allowing State courts to interpret their statutes in the first instance.

Finally, the Texas Supreme Court's refusal to grant Duran's motion for leave to file petition for writ of mandamus did not violate Duran's rights under the first amendment to the United States Constitution. Because Duran does not hold a license to practice public accountancy under the Texas Public Accountancy Act, use of the term "accounting" in her corporate charter advertises an unlawful activity and is misleading to the public. In Texas, offering and providing accounting services for pay to the public constitutes the practice of public accounting. The state has a substantial interest in regulating the practice of public accountancy. The state has effected that interest directly and narrowly by prohibiting unlicensed individuals from using the term "accounting" in communications with the public.

ARGUMENT

I.

THIS COURT'S JURISDICTION UNDER 28 U.S.C. §1257(a) HAS NOT BEEN INVOKED BECAUSE THE TEXAS SUPREME COURT'S ORDER DENYING DURAN'S MOTION FOR LEAVE TO FILE MANDAMUS DOES NOT PRESENT A FEDERAL QUESTION.

Duran erroneously contends that this Court has jurisdiction under 28 U.S.C. §1257(a), which provides in pertinent part:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the ... validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

laws of the United States....

Id. The Texas Supreme Court's Order denying Duran's motion for leave to file petition for writ of mandamus was not a decision on the merits of her federal constitutional claim, but was a refusal to hear a matter that was not appropriate for mandamus. See Order of the Texas Supreme Court, Duran's Petition, Appendix, p. A-2. The Texas Supreme Court's decision, therefore, was based on purely state law grounds, not on grounds involving a federal question.

A. Final Judgments Predicated on State Law Procedural Defects Do Not Present Federal Questions for this Court's Review.

Two cases decided by this Court clearly establish that state court final judgments or decrees predicated on state law grounds do not present federal questions that trigger this Court's review authority. In *Newman v. Gates*, 204 U.S. 89 (1907), petitioners sought this Court's review of the Indiana Supreme Court's decision dismissing their state court appeal. This Court held that it lacked jurisdiction to review the Indiana Supreme Court's decision because, contrary to petitioners' assertion, the decision was not premised on the lower court's judgment, which involved a federal constitutional question, but was premised on procedural defects in the appeal itself. Specifically, a necessary party had not been included in the appeal as a party-appellant. In refusing to accept petitioners' case for review, this Court held:

As the jurisdiction of this court to review the judgments or decree of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit

could be had, and as, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Id at 95 (emphasis added).

The same result obtained in *Hammerstein v. Superior Court of California*, 340 U.S. 622 (cause abated), 341 U.S. 491 (1951) (decision rendered). In *Hammerstein*, this Court held that it did not have jurisdiction to review the California Supreme Court's decision refusing to grant a writ of certiorari. Having determined that the California Supreme Court's decision was based on the petitioner's failure to utilize the proper channel of review, namely ordinary appeal, this Court held that the California Supreme Court's decision rested on independent state grounds, and the federal question in dispute in the lower court was not necessary to its decision. 341 U.S. at 493.

The analyses in *Newman* and *Hammerstein* apply here. Contrary to Duran's representations, the Texas Supreme Court never considered the merits of her mandamus petition; it only considered her motion for leave to file said petition. Permission was denied.

B. Duran Failed to Meet the Requirements for Mandamus Review Under Texas Law.

In Texas, as in most other states, a writ of mandamus will issue only to correct a clear violation of a duty imposed by law or a clear abuse of discretion. *Garcia v. Peebles*, 734 S.W.2d 343, 345 (Tex. 1987); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984). Mandamus is an extraordinary remedy that is available only when no adequate remedy at law exists. *Johnson v. Fourth*

Court of Appeals, 700 S.W.2d at 917. To obtain a writ of mandamus against the Secretary of State, Duran would have to show that she had a clear right to relief, that the Secretary of State had a clear duty to act, and that no other adequate remedy at law existed at the time the Secretary of State performed the action complained of. Duran failed to meet her burden.

1. Duran had an adequate remedy at law.

The Texas Business Corporation Act empowers the Secretary of State to administer said act. Tex. Bus. Corp. Act Ann. art. 1.01 *et seq.*, art. 9.03 (Vernon 1980) ("Act"). Article 9.04 of the Act provides in pertinent part:

If the Secretary of State shall fail to approve any articles of incorporation, such person or corporation may appeal to any district court of Travis County by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried de novo by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

Id. The above procedure was the appropriate method of review of the Secretary of State's decision on Duran's charter—not the extraordinary remedy of an original mandamus proceeding in the Texas Supreme Court.

Article 9.04 is conspicuously absent from Duran's petition to this Court. She relies instead on Tex. Gov't Code Ann. §22.002(c) (Vernon 1988) as authority for the propri-

ety of an original mandamus proceeding in the Texas Supreme Court. Section 22.002(c) of the Government Code, however, is a general provision authorizing original mandamus proceedings against *any* of the officers of the executive departments of the State of Texas. It is an established rule of statutory construction that a specific statute controls over a general statute. *See State v. Mauritz-Wells Co.*, 175 S.W.2d 238 (Tex. 1943). Section 22.002(c) of the Texas Government Code is a general provision; article 9.04 of the Act is a specific provision relating to the Secretary of State. Therefore, article 9.04 controls.

Additionally, the Bar Committee's comments to article 9.04 confirm that article 9.04 was Duran's appropriate method of review. The Committee stated: "This Article makes an important change in the Texas law. Under prior statutes the remedy of a disappointed applicant against the Secretary of State lay in original mandamus proceedings in the Supreme Court." Tex. Bus. Corp. Act. Ann. 1955 Bar Comm. Comments to art. 9.04 (Vernon 1980).

Duran's case is distinguishable from *Gordon v. Lake*, 356 S.W.2d 138 (Tex. 1962), wherein the Texas Supreme Court held that article 9.04 did not apply to a trust charter applicant seeking incorporation pursuant to a statute that was *outside* the purview of the Texas Business Corporation Act. In that case, an original mandamus proceeding in the Texas Supreme Court was the appropriate remedy. In Duran's petition to this Court, Duran concedes that the Texas Business Corporation Act governs the Secretary of State's action with respect to her charter application. Therefore, there is no dispute that article 9.04 of the Act was her available method of review.

2. There was no clear duty upon the Texas Secretary of State to accept Duran's articles of incorporation.

A writ of mandamus will issue under Texas law

when a state official fails to observe a mandatory, legal obligation conferring a right or forbidding a particular action. *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985). In determining whether mandamus should issue, Texas courts must make an independent inquiry as to whether the state official's action is contrary to some clearly established legal duty. *Strake v. Court of Appeals for the First Supreme Judicial Dist. of Texas*, 704 S.W.2d 746, 747 (Tex. 1986).

Article 3.03 of Texas Business Corporation Act provides: "*If the Secretary of State finds that the articles of incorporation conform to law, he shall, when all fees have been paid as required by law (3) Issue a certificate of incorporation to which he shall affix the copy.*" *Id.* (emphasis added). Article 3.03 imposes a duty upon the Secretary of State to issue a corporate charter only *after* he determines that the applicant's articles of incorporation conform to law. The determination of whether an applicant's articles of incorporation conform to law involves discretion. Therefore, mandamus is not an appropriate remedy to review such determinations.

Mandamus was further inappropriate because Duran was not complaining about the Secretary of State's action *per se*, but was in essence attempting to challenge the constitutionality of the Texas Public Accountancy Act of 1979, Tex. Rev. Civ. Stat. Ann. art. 41-1, §8 (Vernon Supp. 1990). Duran's right to challenge the constitutionality of a statute is at law, under the Texas Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §37.001 *et seq.* (Vernon 1986). Section 37.006 of that act requires that the Texas Attorney General be served in such a suit, and no such service was made.

II.

ASSUMING THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(a), IT SHOULD REFRAIN FROM EXERCISING SUCH JURISDICTION PURSUANT TO ITS DISCRETIONARY AUTHORITY.

In *Hammerstein v. Superior Court of California*, 341 U.S. 491 (1957), this Court recognized that the presence of federal jurisdiction for a writ of certiorari does not automatically determine the exercise of that jurisdiction, because the issuance of the writ is discretionary. 341 U.S. at 493. Because of the undeveloped posture of this case, this Court should deny certiorari review.

Duran's case has not been considered on the merits by a single Texas court; it comes without the benefit of a trial record. No evidence has been presented by either side. A critical issue with respect to the merits of this case is whether the use of the term "accounting" by Duran in a trade name is misleading when Duran is not licensed to practice public accounting.

Established principles of comity, abstention and exhaustion of state judicial remedies counsel in favor of withholding the exercise of jurisdiction in this case. In *Pennzoil v. Texas*, 481 U.S. 1 (1987), this Court stressed the policy reasons behind those principles. The Court recognized that comity, which is the proper respect for state functions, was one of those reasons. 481 U.S. at 10. "Another important reason for abstention is to avoid unwarranted determination of federal constitutional questions." 481 U.S. at 11. This Court stated:

When federal courts interpret state statutes in a way that raises federal constitutional questions, 'a constitutional

determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time—thus essentially rendering a federal-court decision advisory and the litigation underlying it meaningless.’

481 U.S. at 11 [quoting *Moore v. Sims*, 442 U.S. 415 (1979)]. Further, in *Moore v. Sims*, this Court stated:

States are the principal expositors of state law. Almost every constitutional challenge ... offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals.

442 U.S. at 430-31. As the above cases so eloquently state, the Texas state courts should be given an opportunity to determine the federal constitutional claim raised by Duran in the first instance.

Thus, even if it is determined that this Court has jurisdiction, the Court should refrain from exercising it in order to give the State judicial apparatus an opportunity to interpret its laws. It does not appear that Duran lost her right to *de novo* review in state district court. Thus, she cannot claim she had no other available remedy. Duran, of course, may raise her federal constitutional claim in state district court. See e.g. *City of Amarillo v. Hancock*, 238 S.W.2d 788, 790 (Tex. 1951) (“[D]ecisions of an administrative body may be attacked in court if they violate some

provisions of the state or Federal Constitution.") Hence, Duran can obtain complete relief in state court.

III.

THE TEXAS SUPREME COURT'S REFUSAL TO CONSIDER ISSUING A WRIT OF MANDAMUS TO COMPEL THE SECRETARY OF STATE TO ISSUE A CORPORATE CHARTER UNDER THE NAME "DURAN'S ACCOUNTING AND TAX SERVICE" DID NOT VIOLATE DURAN'S FIRST AMENDMENT RIGHTS TO COMMERCIAL SPEECH BECAUSE DURAN DOES NOT HOLD A LICENSE TO PRACTICE PUBLIC ACCOUNTANCY, A PREREQUISITE TO OFFERING OR PROVIDING ACCOUNTING SERVICES TO THE PUBLIC IN TEXAS.

Petitioner asserts that the Secretary of State's refusal to issue a corporate charter for "Duran's Accounting and Tax Service" to Duran, who admits that she is not licensed, violates Duran's first amendment rights to commercial speech. As a practical matter, however, Duran is not challenging the actions of the Secretary of State; she is challenging the constitutionality of section 8 of the Texas Public Accountancy Act of 1979, as amended, art. 41a-1, Tex. Rev. Civ. Stat. Ann. (Vernon Supp. 1990).

A. The First Amendment Does Not Protect Unlawful or Misleading Commercial Speech.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), this Court established a four-part test for determining whether the first amendment protects commercial speech. The first part of the test is whether the commercial speech falls under the first amendment at all. Advertising unlawful or

misleading activity is not protected. See e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding statute that prohibited practice of optometry under a trade name because trade names could be misleading to the public).

Duran attempts to analogize her case with those presented in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In those cases, this Court recognized that the free flow of commercial speech is vital to our free enterprise system. Those cases, however, dealt with the advertising of lower prices by licensed individuals or entities in situations in which no advertising had been allowed. At issue in *Virginia Pharmacy* was the validity of a Virginia law preventing pharmacies from advertising the prices of prescription drugs. *Bates* addressed the truthful advertising of the prices at which certain routine legal services were provided. Duran is advertising a service that individuals must be licensed to provide.

Article 41a-1, section 8(g), prohibits practicing public accountancy in Texas without a license from the Texas Board of Public Accountancy. Art. 41a-1, § 8. Duran admits that she is not licensed as a public accountant. Consequently, Duran's corporate name advertises an unlawful activity. The first amendment does not protect advertising unlawful activities. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (upholding ordinance prohibiting newspaper "help wanted" advertisements that were categorized by gender).

In *Texas State Board of Public Accountancy v. Fulcher*, 515 S.W.2d 950, 954 (Tex. Civ. App.—Corpus Christi, 1974, writ ref'd n.r.e.) ("Fulcher I"), the court stated:

It is well settled that *accounting* is a highly skilled and technical profession that affects the public welfare, and

which the state, in the exercise of its police power, may regulate.

515 S.W.2d at 954 (emphasis added). The *Fulcher I* court also stated that

Appellee, by offering and furnishing accounting services for pay to the general public was engaged as an accountant in the practice of public accounting.

515 S.W.2d at 956 (emphasis added). Any person in Texas who advertises or provides accounting services for pay to the public is engaged in the practice of public accountancy and must have a license issued under the Public Accountancy Act.

Duran's argument is based on the premise that unlicensed individuals may practice accounting so long as they do not hold themselves out to the public as public accountants. In other words, she argues that if it is lawful to practice accounting, it cannot be misleading to advertise that one is practicing accounting. Apparently, Duran is relying on language in *Fulcher I* to the effect that the Public Accountancy Act "does not prohibit an unlicensed accountant from practicing accountancy or doing accounting work." 515 S.W.2d at 957. The Texas Board of Public Accountancy sought only to enjoin Fulcher from holding himself out as an "accountant," however, the language regarding the practice of accounting was dicta. Further, the *Fulcher I* court stated that offering or providing accounting services for pay to the public constitutes the practice of public accountancy. *Fulcher I*, 515 S.W.2d at 956. Duran is attempting to offer accounting services to the public, an activity that is unlawful without a license.

Moreover, the use of the word "accounting" by an unlicensed individual is inherently misleading, even if

that individual could legally practice accounting without a license. In *Fulcher v. Texas State Board of Public Accountancy*, 571 S.W.2d 366, 370 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.), (“Fulcher II”) the court of appeals upheld the trial court’s determination that an unlicensed individual’s use of the term “accounting” is misleading because the term reflects the standard, accepted concept that providing accounting services to the public constitutes the practice of public accountancy. See also *Fulcher I*, 515 S.W.2d at 956. Both *Fulcher I* and *Fulcher II* recognized that the Texas Legislature had determined, as a matter of law, that the terms “accountant” or “accounting” by unlicensed individuals would cause confusion. See *Fulcher I*, 515 S.W.2d at 956; *Fulcher II*, 571 S.W.2d at 370.¹ Deference to the legislature in such cases is appropriate. See *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344-45 (1986). Consequently, the first part of the *Central Hudson* test is not met; Duran’s corporate name is not entitled to first amendment protection.

Duran relies on *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Virginia Pharmacy Board v. Citizens Consumer Council*, 425 U.S. 478 (1976). This Court’s decision in *Friedman v. Rogers*, 440 U.S. 1 (1979), is more on point than the cases relied on by Duran. In *Friedman v. Rogers*, this Court upheld a Texas statute that prohibited practicing optometry under a trade name because of the potential that trade names would mislead the public. The danger addressed by the statute at issue in that case was that the public might come to associate a certain quality of care from one optometrist with a trade name and be misled into believing that the same level of care would be provided by all individuals using the trade name.

The danger of misleading the public is greater in

¹Because Duran chose (improperly) to proceed by mandamus, no facts were developed. The Texas State Board of Public Accountancy has conducted surveys that support the state’s position.

this case because the terms "accountant" and "accounting" have an established meaning for the public. Because the public identifies the terms with the practice of *public* accountancy, the public will be misled into believing that it will receive a higher level of service, i.e. the services of a licensed public accountant. The name "Duran's Accounting and Tax Service" advertises qualifications that Duran, an unlicensed individual, simply does not have.

B. The State Has a Substantial Interest in Regulating the Practice of Public Accountancy.

Assuming, *arguendo*, that petitioner may legally provide accounting services without a certificate and that use of the term "accounting" is not misleading, the second part of the *Central Hudson* test comes into play. The second question is whether the state's interest is substantial. 447 U.S. at 567. In *Fulcher I*, the court of appeals stated:

[T]he need to protect the public against fraud [and] deception as the consequences of ignorance or incompetence in the practice of most professions makes regulation necessary.... Public accountancy now embraces many intricate and technical matters dealing with many kinds of tax laws, unfair trade practices, rate regulations, stock exchange regulations, reports required by many governmental agencies, financial statements and the like. So, in this view of the practice of public accounting, the public welfare of this State demands that it be regulated, as is done by Article 41a, V.A.C.S., as amended.

515 S.W.2d at 954-55. The *Fulcher I* court aptly expressed the State's substantial interest. See also *Friedman v.*

Rogers, 440 U.S. 1 (1979).

C. The State's Prohibition on Use of the Term "Accounting" by Unlicensed Individuals Directly and Narrowly Advances the State's Regulatory Interest.

The third part of the *Central Hudson* test is whether the state's regulation directly advances the government's interest in regulation. 447 U.S. at 567. The Public Accountancy Act does no more "than eliminate the exact source of evil it sought to remedy." See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (upholding total ban on posting signs on public property). The prohibition on the use of the terms "accountant" and "accounting" is aimed directly at preventing public confusion and harm from reliance on an unlicensed individual. Even if the practice of accounting were legal, the probable public confusion would justify a ban on advertising. See *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 344-45 (1986).

The final part of the *Central Hudson* test is whether state regulation is only as broad as necessary to effect the state's interest in regulation. 447 U.S. at 567. The state has not prohibited all advertising by unlicensed individuals. Nor has the state prohibited advertising "tax service" or "bookkeeping service" although the public could believe that those services are provided traditionally by public accountants and could, therefore, be misled. The focus of the state's regulation is on the provision of accounting services to the public. *Fulcher I*, 515 S.W.2d at 956. The state's prohibition on the use of the terms "accountant" and "accounting" by unlicensed individuals is narrowly drawn to protect the public from the unlicensed practice of public accountancy and from confusion about what constitutes a "public accountant."

Arguably, the state could effect the same goal by

requiring an affirmative statement that the individual is unlicensed (e.g., "Not Board Certified"). Duran, however, did not attempt to register her trade name with such a disclaimer. Further, Duran would probably challenge such a requirement as more intrusive and broader than the mere prohibition on the use of the terms "accountant" or "accounting" by unlicensed individuals and entities.

Finally, when a statute prohibits holding out *and* practicing a profession without a license, a disclaimer that someone practicing without a license is not licensed does not excuse violation of the prohibition. *Clark v. Eads*, 165 S.W.2d 1019, 1023 (Tex. Civ. App.—Fort Worth 1942, writ ref'd) (unlicensed architects could not excuse practicing without a license simply by explaining to their clients that they had no license). Consequently, the state has chosen the narrowest possible way to prevent unlicensed individuals from advertising in a way that misleads the public into believing that they are licensed.

CONCLUSION

The fundamental flaw in Duran's petition for writ of certiorari is that she has no basis on which to invoke this Court's jurisdiction. The order of the Texas Supreme Court denying Duran leave to file an original mandamus proceeding did not involve a federal question. The order was based on independent state grounds, to wit: Duran had no right to mandamus relief under Texas law. Even, if we assume that this Court has jurisdiction, the long-standing prudential considerations of comity, abstention and exhaustion of state judicial remedies counsel in favor of declining certiorari review. Duran has an adequate remedy within the state's judicial apparatus to have her federal constitutional claim heard.

Finally, this Court should not grant Duran certiorari review because the Texas Supreme Court's refusal to grant Duran's motion for leave to file petition for writ of

mandamus did not violate her first amendment rights under the United States Constitution. Because petitioner does not hold a license issued under the Texas Public Accountancy Act, use of the term "accounting" in her corporate charter advertises an unlawful activity and is misleading to the public. The state has a substantial interest in regulating the practice of public accountancy, defined as offering and providing accounting services to the public. The state has effected that interest directly and narrowly by prohibiting unlicensed individuals from using the term "accounting."

In view of the foregoing, respondents pray that Duran's petition for writ of certiorari be denied in its entirety.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

DAVID A. TALBOT, JR.
Special Assistant
Attorney General
Chief, Finance Division

EDNA RAMON BUTTS
Assistant Attorney General
Chief, Insurance, Banking
and Securities Section

*JAMES C. TODD
Assistant Attorney General
Chief, General Litigation Division

*Counsel of Record

SEDORA JEFFERSON
Assistant Attorney General

JENNIFER RIGGS
Assistant Attorney General
(512) 463-2120
Post Office Box 12548
Austin, Texas 78711-2548

PROOF OF SERVICE

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

I, James C. Todd, depose and say that I am attorney of record for Respondents herein, and that on April _____, 1990, pursuant to Rule 28, Rules of the Supreme Court, I served three (3) copies of the foregoing Respondents' Opposition to Petition for Writ of Certiorari on opposing counsel by U.S. mail in a duly addressed envelope, with first class postage prepaid, certified, return receipt requested to Gerald J. Thain, counsel of record for petitioner, at 215 Law Building, University of Wisconsin, Madison, Wisconsin 53706.

JAMES C. TODD

Subscribed and sworn to before me on the _____ of April, 1990.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS



APPENDIX

TABLE OF CONTENTS

	Page
Copy of Letter from Texas Supreme Court to Attorney Francis G. Culhane	A-2
Texas Public Accountancy Act of 1979, Tex. Rev. Civ. Stat. Ann. art. 41a-1, §8 (Vernon Supp. 1990)	A-4

SUPREME COURT OF TEXAS
P.O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 8, 1989

Mr. Francis G. Culhane
103 S. Irving, Suite 801
San Angelo, TX 76903

RE: Case No. C-9157

STYLE: MARGARET ANN DURAN
v. GEORGE S. BAYOUD, JR., SECRETARY
OF STATE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Respectfully yours,

John T. Adams, Clerk

Original Signed by
Courtland Crocker, Deputy
By _____ Deputy

cc: Mr. George S. Bayoud, Jr.
Secretary of State
P. O. Box 13697
State Capitol Building, Room 127
Austin, Texas 78701

* * *

IN THE SUPREME COURT OF TEXAS

I, JOHN T. ADAMS, Clerk of the Supreme Court of Texas, as official custodian of the records of said Court, do hereby certify that the attached letter (copy) is a true and correct copy of the original of said letter mailed to the parties of record on November 8, 1989 as notification of the overruling of action on petition for writ of mandamus filed herein on October 20, 1989 in the Supreme Court of Texas, case number C-9157 and styled Margaret Ann Duran vs. George S. Bayoud, Jr., Secretary of Texas.

WITNESS my hand and seal of the Supreme Court of Texas,

at the City of Austin, this,
the 16th day of April 1990.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

By /s/
Peggy Littlefield
Chief Deputy Clerk

**PUBLIC ACCOUNTANCY ACT OF 1979,
ARTICLE 41a-1 SECTION 8**

Sec. 8. Prohibition against practicing without license. (a) No person shall assume or use the title or designation "Certified Public Accountant," or the abbreviation "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such person is a certified public accountant, unless such person has received a certificate as a certified public accountant under this or prior Acts, holds a license issued under Section 9 of this Act which is not revoked or suspended and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act; provided, however, that an accountant of another state or foreign country who has registered under the provisions of this or prior Acts and who holds a license issued under Section 9 of this Act may use the title under which he is generally known in his state or country followed by the name of the state or country from which he received his certificate, license, or degree.

(b) No partnership shall assume or use the title or designation "Certified Public Accountant" or the abbreviation "CPA" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership or corporation is composed of certified public accountants unless such partnership or corporation is registered as a partnership or corporation of certified public accountants under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such partnership's or corporation's offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act.

(c) No person shall assume or use the title or designation "Public Accountant" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to

indicate that such person is a public accountant, unless such person is registered as a public accountant under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such person's offices in this state for the practice of public accounting are maintained and registered as required under Section 10 of this Act or unless such person has received a certificate as a certified public accountant under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such person's offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act.

(d) No partnership or corporation shall assume or use the title or designation "Public Accountants" or any other title, designation, words, letters, abbreviation, sign, card, or device tending to indicate that such partnership or corporation is composed of public accountants, unless such partnership or corporation is registered as a partnership or corporation of public accountants under this or prior Acts or as a partnership or corporation of certified public accountants under this or prior Acts, holds a license issued under Section 9 of this Act, and all of such partnership's or corporation's offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act.

(e) No person shall assume or use the title or designation "certified accountant," "chartered accountant," "enrolled accountant," "licensed accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations, "CA," "PA," "EA," "RA," or "LA," or similar abbreviations likely to be confused with "CPA"; provided, however, that only a person holding a license issued under Section 9 of this Act and all of whose offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act may hold himself out to the public as an "accountant" or "auditor" or any

combination of said terms; and provided further that a foreign accountant registered under this or prior Acts, who holds a license issued under Section 9 of this Act and all of whose offices in this state for the practice of public accountancy are maintained and registered as required under Section 10 of this Act, may use the title under which he is generally known in his state or country, followed by the name of the state or country from which he received his certificate, license, or degree.

(f) No person shall sign or affix his name or any trade or assumed name used by him in his profession or business with any wording indicating that he is an accountant or auditor or with any wording indicating that he has expert knowledge in accounting or auditing, to any accounting or financial statement, or to any opinion on, report on, or certificate to any accounting or financial statement, unless he has complied with the applicable provisions of this Act; provided, however, that the provisions of this subsection shall not prohibit any officer, employee, partner, or principal of any organization from affixing his signature to any statement or report in reference to the financial affairs of the organization with any wording designating the position, title, or office which he holds in said organization, nor shall the provisions of this subsection prohibit any act of a public official or public employee in the performance of his duties as such.

(g) No licensee shall assume or use a name which is misleading in any way as to the legal form of the firm or as to the persons who are partners, officers, or shareholders of the firm. The name or designation any partnership or corporation may assume or use shall contain the personal name or names of one or more individuals presently or previously members thereof, and the name or designation any individual may assume or use shall contain his name. No trade name or descriptive words indicating character or grade of service offered may be used or included except as authorized by rules promulgated by the board.

(h) No licensee shall assume or use the designation "and Company" or "and Associates" or abbreviations thereof in designating a firm in the practice of public accountancy unless there are at least two persons holding licenses under this Act involved in the practice of the firm.